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IN THE

Supreme Court of the United States

October Term 1959

No. ~~1011~~ 142

MARVIN DAYAN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

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IN THE

Supreme Court of the United States

October Term 1959

No. .....

MARVIN DAYAN,

Petitioner.

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Marvin Dayan, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, entered on March 2, 1960, reviewing the judgment of the Municipal Court of the Los Angeles Judicial District.

Opinions Below.

The opinion and judgment of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, is unreported and is set forth in Appendix A, *infra*, at page 1.

Jurisdiction.

The judgment of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, was entered on March 2, 1960.

Rehearing was denied on March 14, 1960. A copy of the Order Denying Rehearing is found in Appendix A at page 2.

The jurisdiction of this Court was invoked under the provisions of 28 U. S. C. Sec. 1257(3).

The Appellate Department of the Superior Court of the State of California is a Court of Last Resort.

In re Wiegand (D. C. 1939), 27 Fed. Supp. 725.

Questions Presented.

1. Was Marvin Dayan, a licensed Doctor of Chiropractic, the petitioner, denied due process of law in violation of the 14th Amendment to the Constitution of the United States:

(a) When he was arrested for an alleged violation of Section 2141 of the California Business and Professions Code (Medical Practice Act);

(b) When he was tried and convicted for an alleged violation of Section 2141 of the California Business and Professions Code;

(c) When the trial court denied him a trial by jury by refusing to permit him to introduce evidence in his own defense and ruled that he was guilty as a matter of law;

(d) When he was convicted of a crime not defined by statute or by the common law but was convicted of a constructive crime created by State Courts;

(e) When he is excluded from the practice of Chiropractic as provided by his license by his arrest and conviction under the Medical Practice Act, for doing the acts permitted by his license issued under the Chiropractic Act, when he is not licensed under the Medical Practice Act?

2. Was Marvin Dayan, a licensed Doctor of Chiropractic, the petitioner, denied equal protection of the law in violation of the 14th Amendment to the Constitution of the United States:

(a) When in the trial court and affirmed by the Appellate Court, he was denied the right to rely upon the possession by him of an unrevoked license issued to him by the California State Board of Chiropractic Examiners as a complete defense to the charge of violating Section 2141 of the Business and Professions Code; and

(b) Was required to prove his innocence by proving affirmatively that he had not violated the terms of his Chiropractic license, as defined by the Appellate Department of the Superior Court, in and for the County of Los Angeles, contrary to the wording of Section 2141 of the California Business and Professions Code, and the Chiropractic Act; and

(c) When he was denied the right to do the acts permitted by the terms of his license when persons licensed under the California State Medical Practice Act are permitted to do the acts permitted by the wording of their respective licenses without being subject to arrest under Section 2141 of the California Business and Professions Code?

3. Was Marvin Dayan, petitioner herein, deprived of liberty and a property right in violation of the 14th Amendment of the Constitution of the United States:

(a) When he was denied the right by the State Courts to practice Chiropractic as provided by the terms of his license and the Chiropractic Act which repealed all Sections of the Medical Practice Act in conflict therewith?

Statute Involved.

The Statute involved is Section 2141 of the California Business and Professions Code, being a codification of the Medical Practice Act, Section 17, but because of certain decisions of the California State Courts interpreting Section 2141, it cannot be considered alone but must be considered with Sections 1000, 1001, 4052 and 4057 of the Business and Professions Code and the Chiropractic Initiative Act codified as Sections 1000-1 to 1000-19 of the Business and Professions Code, although only Sections 1000-1, 1000-4, 1000-5, 1000-6, 1000-7, 1000-15, and 1000-18 Business & Professions Code are deemed pertinent to this matter and are either set out in the text or set out in the Appendix B at the following pages:

Section	*Page*
1000. Business and Professions Code	16
1001. Business and Professions Code	16
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Chiropractic Act as codified:	
1000-1. Business and Professions Code	18
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Section 2141 of the California Business and Professions Code which states:

"Any person, who practices or attempts to practice, or who advertises or holds himself out as practicing, any system or mode of treating the sick or afflicted in this State, or who diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury, or other mental or physical condition of any person, without having at the time of so doing a valid, unrevoked certificate as provided in this chapter, is guilty of a misdemeanor."

Chapter 5 Business and Professions Code (Chapter refers to Medical Practice Act. Explanation of Chapter supplied.)

Amendment XIV of the Constitution of United States.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement.

It is the contention of petitioner that he was unlawfully arrested, tried and convicted and so in this statement all statements of fact are made with this contention as a factor and the words unlawfully, etc. will not be again repeated or labored.

1. Petitioner was at the time of his arrest and now is, a Doctor of Chiropractic licensed to practice Chiropractic as taught in Chiropractic Schools or Colleges and also to use all necessary mechanical, and hygienic and sanitary measures incident to the care of the body but is not authorized to practice medicine, surgery, osteopathy, denistry or optometry, nor use any drugs or medicine now or hereafter included in materia medica.

2. Petitioner was arrested May 5, 1959 for an alleged violation in three counts of Section 2141 of the California Business and Professions Code and released on $2500.00 bail and before trial in the Municipal Court and while at liberty on bail, petitioner made a series of applications for writ of habeas corpus to the Superior Court of the State of California, in and for the County

of Los Angeles, the State District Court of Appeal, and the Supreme Court of the State of California, all of which were denied. The applications for writs raised the same constitutional questions as are being raised here except for the additional constitutional questions herein raised arising out of the trial.

3. The petitioner was tried before a Jury October 30, 1959 in the Municipal Court of Los Angeles Judicial District, No. 98050, on three counts of alleged violation of Section 2141 of the Business and Professions Code. Count IV, an alleged violation of Section 4143 of the Business and Professions Code, was dismissed. The acts constituting the alleged crime was the giving of an injection with a hypodermic syringe and needle and giving a vaccination on three separate occasions. Appendix A, page 8.

4. The petitioner was found guilty of the three counts and was on November 10, 1959 sentenced to serve six months on Count I and pay a fine of $500.00 on both Counts II and III, or serve an additional 100 days on each of said Counts if the fines were not paid. Previous to sentence, petitioner applied for probation which was denied. Appendix A, pages 10-13, incl.

5. That petitioner appealed from the conviction and from the orders denying the motion for new trial and motion for probation. Appendix A, pages 14 and 15, incl.

6. That the Appellate Department of the Superior Court of the State of California in case No. CR A 4270, denied the appeal and affirmed the judgment.

7. That a petition for rehearing was filed and on March 14, 1960 the petition was denied.

8. The Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, is the highest court available to petitioner.

9. In the court of first instance, to wit, the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, the case is completed and the court has no further jurisdiction as the petitioner having been sentenced November 10, 1959 was committed to the City Jail of Los Angeles on April 22, 1960, to serve his sentence. On April 22, 1960, a petition for a writ of habeas corpus was filed in the United States District Court, Southern District of California, Central Division, entitled In the Matter of the Application of Marvin Dayan, also known as Marvin Dayon, for a Writ of Habeas Corpus, No. 485-60Y, and an order to show cause issued returnable by order of the Presiding Judge of said Court, the Honorable Peirson M. Hall, May 2, 1960. The petitioner was released and on May 2, 1960 the Honorable Leon R. Yankwich, Judge presiding, made his order discharging the order to show cause and rendered a judgment of dismissal and gave a stay of execution until May 14, 1960. The court cited the failure of petitioner to apply for a writ of certiorari to the Supreme Court of the United States as a bar to the granting of the writ. An appeal from the order was filed and $250.00 cash bond posted May 6, 1960. On May 11, 1960, on motion of petitioner, the Honorable Leon R. Yankwich granted a stay of execution and ordered the petitioner to remain at liberty on his own recognizance until final disposition of his case in No. 485-60Y to permit petitioner to file this petition for a writ of certiorari and to ask this Court for a stay of execution pending the review on certiorari. That petitioner is

now at liberty on his own recognizance and if this writ is granted, will request a stay of execution pending final disposition of this matter.

10. In the trial of the action the petitioner was denied the right to introduce evidence as to what was taught in Chiropractic Schools or Colleges. Said denial was on the grounds that such evidence was immaterial. Petitioner made an offer of proof that the acts specified by the prosecution as crimes in violation of Section 2141, to wit, hypodermic injections and vaccinations, were within the scope of his license and were taught in the Chiropractic Schools and Colleges as a part of Chiropractic and necessary mechanical, and hygienic and sanitary measures incident to the care of the body, which offer was rejected and denied as immaterial.

The pertinent portions of the Reporter's Transcript appearing in the certified record as pages 125 to 234, supporting the above summary are pages 192 to 211, lines 1 to 15; page 212 and 213, lines 1-18, pages 216 and 217, line 1 and appear in Appendix C, commencing at page 25, *infra*.

11. At the conclusion of the trial the court instructed the jury that any vaccination of a human being and any injection by a hypodermic needle in a human body were violations of Section 2141 of the California Business and Professions Code and that what substance was injected or the purpose of the injection were immaterial.

12. The foreman of the jury requested a definition of the word "hygienic" appearing on the license issued to petitioner by the State Board of Chiropractic Examiners and the Court refused to give any instructions as to the definition on the grounds that it was immaterial.

Set out below are the portions of the Reporter's Transcript supporting the above summary and appear on pages 228 to 231 inclusive of the certified record.

"In a case charging offenses as here, it is the duty of the defendant to show what, if any license has been issued to him to practice any of the healing arts in this State. It is uncontradicted that the defendant is licensed as a Doctor of Chiropractic and is unlicensed as a practitioner in any other of the healing arts.

You are instructed that it is unlawful under the Section here charged, for a chiropractor to give a hypodermic injection for the treatment of any ailment, disease or other physical condition. That it is further unlawful for him to sever or penetrate the tissues of human beings. Therefore, if you find beyond a reasonable doubt that the defendant did, on or about September 6th, 1958, give a hypodermic injection or injections, to a human being or human beings, for the treatment of any ailment, disease or other physical condition, then you should find the defendant guilty as charged in Count I.

Also, if you find beyond a reasonable doubt, that the defendant did, on or about the 11th day of October, 1958, give a hypodermic injection or injections to a human being or human beings, for the treatment of any ailment, disease or other physical condition, then you should find the defendant guilty as charged in Count II.

Also if you find, beyond a reasonable doubt, that the defendant did, on or about October 29th, 1958, give a hypodermic injection or injections to a human being or human beings for the treatment of any ail-

ment, disease or other physical condition, or if you find beyond a reasonable doubt that on or about October 29th, 1958, the defendant vaccinated a human being or human beings, then you should find the defendant guilty as charged in Count III.

Upon retiring to the jury room you will select one of your fellow jurors to act as foreman, who will preside over your deliberations and will sign the verdict to which you may agree. In order to return a verdict it is necessary that all the jurors agree to the decision. As soon as all of you have agreed upon verdicts, you shall have them signed by your foreman and then return with them to this room."

Swear the Bailiff.

(Whereupon the jury left the courtroom to begin its deliberations at 11:34 A.M. on this date.)

Los Angeles, California, Monday, November 2, 1959: 12:02 P.M.

"The Court: Mrs. Warner, the jurors have asked for some clarification. If you will be seated, we will get them out and see if we can help them in any respect.

(Whereupon at 12:03 P.M., on this date, the Jury returned to the courtroom.)

The Court: In the matter of the People against Marvin Dayan, I would address myself, if I may, to the Foreman of the Jury. I am advised, sir that some clarification is requested or needed by the Jury in its deliberations. Is that correct?

Foreman of the Jury: On one part of the license.

The Court: What do you wish to know?

Foreman of the Jury: Do you want me to state it?

The Court: Whoever is the foreman I would like to have state what you need that you think will be helpful in your deliberations, sir.

Foreman to the Jury: If we can just read over the license itself.

The Court: Don't you have it? Do you want it?

Foreman of the Jury: May I see the license?

The Court: I don't know how much more specific the Court can be than the Court has been to you. It makes no difference what the license says. I have instructed you that if he gave injections or if he vaccinated a person he is guilty of this offense, even though he be a licensed chiropractor. Now, how much clearer one can be on that than that I don't know. That is what I have told you. That is what the law is.

You are bound to follow it whether you like it or not or whether you like what the license says or not. It isn't your job to take the license and attempt to interpret what it means. You may see it, of course, if you want it. I don't see how it is going to help you any.

Foreman of the Jury: Actually the term on the license was "hygienic—"

The Court: I don't care what the license says or what the term "Hygienic," means. It should have no meaning to you in the deciding of this case. I have instructed you as succinctly and completely as I know how and as simply as I know how on what

the law is, as I understand it, and as I have instructed you. A chiropractor may not give injections by hypodermic needle nor may he vaccinate persons. I have told you that if you find, beyond a reasonable doubt, either of those things, on the dates indicated, then you are to find him guilty.

How much more succinctly can I put it? I would think with that you should be able to arrive at a verdict. I will ask you to go back and deliberate or do whatever it is you have attempted to do."

Manner in Which Federal Questions Were Raised.

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All points were argued in the briefs filed in the Appellate Court and the Petition for Rehearing filed in the Appellate Court and are found in the certified record as follows:

Appellant's Opening Brief, pp. 76, 77 to 78, lines 1-19, p. 86 to p. 88 inclusive.

Petition for Rehearing p. 103, to line 1, p. 104.

The Federal Questions Herein Have Been Properly Raised and Passed Upon at All Stages of the Proceedings. No Adequate Non-Federal Ground Was Used as a Basis for Respondent's Court Decision.

The constitutional question was presented in time and was raised at all steps of the proceedings in the State Courts, to wit, by demurrer in the trial court, by offers of evidence rejected and by jury instructions given on motion of the trial court (see Appendix D); in the Appellate Department of the Superior Court by the Statement on Appeal and Briefs filed, by the Memorandum Opinion of the Court, and the Certificate of the Presiding Judge of the Appellate Court.

There are no independent grounds existing upon which the State Courts could have found the petitioner guilty without considering the constitutional question and violating petitioner's constitutional rights guaranteed by the 14th Amendment of the Constitution of the United States.

There is no evidence in the record to support the conviction and the conviction is based on a charge not made. This is a violation of due process.

> *Thompson v. Louisville*, Advance U. S. Supreme Ct. Rep. 4 L. Ed. 2 Vol. No. 9 (April 11, 1960), 654, 659.

The People of the State of California in the Chiropractic Initiative Act gave petitioner a right to practice Chiropractic as taught in Chiropractic Schools and Colleges and designated in the Act the subjects to be

taught. When the petitioner attempted to practice in accordance with the express language of his license and Section 7 of the Act, the State of California accused him of violating the Medical Practice Act (Section 2141) and found him guilty of a misdemeanor for doing the very thing the Act and license say he can do.

The necessary elements of a crime under our Constitutional safeguards cannot be found in this situation.

To comply with the 14th Amendment to the Constitution of the United States, the statute under which the defendant is charged, to wit, Section 2141 of the California Business and Professions Code, must have a reasonable degree of certainty so that the defendant charged will not be required at peril of life, liberty or property to speculate as to the meaning of the penal statute under which he is charged.

This is the rule enunciated by the Supreme Court of the State of California in the case of *In re Newbern*, 53 A. C. 789; citing *Lanzetta v. New Jersey*, 306 U. S. 451, 83 L. Ed. 888, *Connally v. General Construction Co.*, 269 U. S. 385, 70 L. Ed. 322. Also see *In re Blaney*, 30 Cal. 2d 643, 653 and *Lorentsen v. Superior Court*, 35 Cal. 2d 49, 60.

Section 2141 of the California Business and Professions Code is clear and concise when applied to *unlicensed persons* but becomes constitutionally vague and uncertain when applied to Chiropractors.

Under the language of Section 2141 a Chiropractor is guilty of a misdemeanor the moment he accepts his license and hangs out his shingle to practice Chiropractic because he then holds himself out as practicing a healing art, *i.e.*, "Chiropractic" or if he adjusts the spine of a

patient by manipulation by hand, he violates Section 2141 as he is "treating" or if he "diagnoses" he is violating Section 2141. Yet no court, not even the Appellate Department of the Superior Court, denies a Doctor of Chiropractic, who holds an unrevoked license from the Chiropractic Board, the right to hold himself out as a Doctor of Chiropractic, to manipulate the spine chiefly by hand, to diagnose, etc., but these acts are violations, nevertheless, of Section 2141 if the wording of Section 2141 is taken as the criteria of the crime.

California has held that Penal Statutes must be construed to reach no further than their words; no person can be made subject to them by implication.

In Re Tweed, 188 Cal. 261, 265, citing *Hackfeld v. United States*, 197 U. S. 442, 450; 49 L. Ed. 826.

Also see:

Reuter v. Board of Supervisors, 220 Cal. 314;
Ex Parte Petracus, 12 Cal. 2d 579;
Werner v. Kenny, 27 Cal. 2d 627, 629;
Gage v. Jordan, 23 Cal. 2d 799, 800.

The application of Section 2141 to Chiropractors by the State Courts and State Prosecutors is the result of judicial legislation which has created a constructive crime not contemplated by the legislature or the People of the State of California which constructive crime subjects the Doctor of Chiropractic to the control of the State Board of Medical Examiners contrary to Sections 1000 and 1001 of the Business and Professions Code and the Chiropractic Act.

Such constructive crimes are denounced by the California Courts in the case of *Ex Parte McNulty*, 77 Cal. 164, 168.

Before the defendant in a criminal trial can be convicted of a crime there must be a unity of act and intent, or criminal negligence. Section 20 Cal. Penal Code.

The intent to commit a criminal act is an essential element of the crime.

People Hoenschle, 132 Cal. App. 387;

People v. Sanchez, 35 Cal. 2d 522, 526.

In *People v. Dillon*, 199 Cal. 1 at page 7 the court said:

> "To render a person guilty of crime it is not essential to a conviction that the proof should show such person to have entertained any intent to violate law. (Pen. Code, sec. 7; People v. O'Brien, 96 Cal. 171 [31 Pac. 45].) It is sufficient that he intentionally committed the forbidden act. Statutes which come clearly within the exercise of the police power of the state, of which section 424 is a striking example, fully illustrate the rule. (People v. McClennegen, 195 Cal. 445 [234 Pac. 91], and cited cases.) Section 20 of the Penal Code is too clear to require judicial support. It provides: 'In every crime or public offense there must exist a union or joint operation of act and intent, or criminal negligence.' The only construction that may be placed upon the above quoted section is that there must be an intent to do the forbidden thing or commit the interdicted act."

In the case at bar, what were the forbidden acts? Neither vaccinations nor hypodermic injections could be the forbidden acts because they are not named in Section 2141 and are not encompassed by any of the de-

scriptive terms of Section 2141 which prohibits the following acts:

1. Practicing a mode or system of treating the sick or afflicted or
2. Diagnosing, treating, operating, or prescribing for any:
   (a) ailment
   (b) blemish
   (c) deformity
   (d) disease
   (e) disfigurement
   (f) disorder
   (g) injury
   (h) mental or physical condition.

The petitioner did none of these acts. Giving vaccinations or hypodermic injections for polio or B-12 as a food supplement are necessary hygienic and sanitary measures incident to the care of the body, permitted under the express terms of the Chiropractic License and do not come under the category of curing a disease or ailment as required by the *Forster* case and *Mangiagli* case relied upon by the pro-ecution.

The defendant in this case could not have committed a crime on the basis of the evidence permitted by the court to be introduced, for the reason that Section 2141 does not forbid him any act his license does not entitle him to do and he cannot have a criminal intent if he does what the State of California and the People of the State of California say he has a right to do in the terms of the license issued to him by the State Board of Chiropractic Examiners. The People introduced no evidence as

to what constituted the practice of medicine or surgery denied Chiropractors by their license and Section 2141 does not mention medicine or surgery.

Historically, Section 2141 was Section 17 of the Medical Practice Act before codification and before the adoption of the Initiative Act by the People in 1922. Chiropractors as well as all other persons practicing healing arts were licensed by the State Board of Medical Examiners so that anyone who did any of the criminal acts specified in Section 17 (2141) was guilty of a misdemeanor unless he held an unrevoked license from the State Board of Medical Examiners.

When the Chiropractic Act was adopted in 1922, the licensing and control of Chiropractors was taken from the Medical Board and by legislative declaration and by the Act itself, Chiropractors were placed under the exclusive control of the Chiropractic Act and the State Board of Chiropractic Examiners and Section 17 of the Medical Practice Act (2141) was left in the statute books to apply only to persons who do not hold a license from either the State Board of Medical Examiners the State Board of Osteopathic Examiners or the State Board of Chiropractic Examiners.

Historically, Section 17, now 2141, has always applied to unlicensed persons and taking the licensing of Chiropractors out of the Medical Act does not expand the scope of Section 2141 to include licensed Chiropractors.

People v. Mills, 74 Cal. App. 353, 357;
People v. LaBarre, 193 Cal. 388, 391, 392.

The State Courts of California have held that a drugless practitioner licensed by the Medical Board could not

be prosecuted under Section 2141 for acts alleged to be violations of his license.

Cooper v. State Board of Medical Examiners, 35 Cal. 2d 242, 247.

In the case of *People v. LaBarre*, 193 Cal. 388, 394, the court pointed out that a license issued under the Chiropractic Act conferred a higher mark of learning and efficiency upon its holder than the license issued to a drugless practitioner under the Medical Practice Act yet drugless practitioners cannot be prosecuted under Section 2141 for violating the terms of their licenses but the Prosecution in the *Dayan* case would subject the petitioner to Section 2141 for alleged violations of his Chiropractic license. This is a denial of due process and equal protection of the law.

In re San Jose Ranch Co. v. San Jose etc. Co., 126 Cal. 322, 326;

11 Cal. Jur. 2d 783, Sec. 310;

14 Cal. Jur. 2d 323, Sec. 112;

People v. Russell, 150 Cal. 450;

People v. McClennegen 195 Cal. 455;

People v. Dawson, 210 Cal. 306.

For all intents and purposes the entire Chiropractic profession has been placed back under the control of the California State Board of Medical Examiners and the practice of Chiropractic by judicial interpretation of the Appellate Department of the Superior Court has been restricted to the manipulation of the spine, chiefly by hand, irrespective of the fact that the Act itself in Section 7 defines the limits of the practice as that which is

taught in Chiropractic Schools or Colleges and also gives the Chiropractor the right to use all necessary mechanical, hygienic and sanitary measures incident to the care of the body. Vaccination and polio shots are for the prevention of disease, a category not mentioned by Section 2141.

The cases of *People v. Fozzler*, 32 Cal. App. 2d Supp. 737 and *People v. Mangiagli*, 97 Cal. App. 2d Supp. 935, are the cases relied upon by the State Medical Board to control the Doctors of Chiropractic and esmasculate the scope of the Chiropractic license. All of the opinion in *People v. Fozzler* is *dicta* as no facts are stated in the opinion.

The case of *Evans v. McGranaghan*, 4 Cal. App. 2d 203, 204, 205, holds that Chiropractors may practice what is taught in Chiropractic Schools or Colleges even though it might be construed as the practice of medicine or surgery before the Act.

The determination of the rights of the Chiropractor under Section 2141 has never been before this Court.

The only parallel case is that of *England v. Louisiana State Board of Medical Examiners*, 259 Fed. 2d 620.

It was held in the *England* case that while the legislature could regulate the practice of medicine, the regulation must not be arbitrary or unreasonable. So are the courts bound by the same rules in the interpretation of the law.

In petitioner's case the facts are the reverse of the *England* case. The People of California in the Chiropractic Intiative Act and the State Legislature in Sections

1000, 1001, 4052 and 4057 of the Business and Professions Code have amply protected the Chiropractors in the practice of Chiropractic and his healing art but the State Courts have by judicial legislation nullified the laws governing Chiropractors, stripped them of their protection and placed them at the mercy of the State Board of Medical Examiners who are determined to limit Chiropractors to the manipulation of the joints and spine, chiefly by hand, the use by Chiropractors of all necessary mechanical, hygienic and sanitary measures incident to the care of the body is ignored.

Contrary to the ideals and traditions of fair play imbedded in our Constitution and American culture, the trial court violated one of the most important safeguards and rules of criminal procedure, namely, that the defendant has a right to have the facts of the alleged crime given to the jury for the jury's sole decision as to his guilt.

In the case of petitioner, the complaint charged three violations of Section 2141 in the language of the statute.

In the conduct of the trial, all witnesses testified that they received hypodermic shots and vaccinations in some instances. One witness testified that the shots were polio shots. The petitioner was denied the right to testify as to the nature and purpose of the shots, and was denied the right to testify as to what he was taught in Chiropractic Schools and Colleges or whether or not the acts charged as crimes, were taught to him in Chiropractic schools and colleges as part of Chiropractic and all necessary mechanical, hygienic and sanitary measures incident to the care of the body as stated on the face of his license and in Section 7 of the Chiropractic Act.

Having prevented the petitioner from defending himself, the trial court then proceeded to define the crime as being the giving of a hypodermic injection and vaccination and directed the jury to find the petitioner guilt if they found that he had given the injections or vaccinations. The defendant admitted giving vaccinations and injections.

The jury requested that the court inform them as to the meaning of the word "hygienic" set forth in petitioner's license, which request was refused by the court who told them it was immaterial that the license referred to "hygienic" and that what was stated on the license was immaterial.

Under these instructions there could be no verdict except guilty and the petitioner was deprived of a trial by jury and was convicted on evidence which does not support or fit the charge and Section 2141 when applied to Chiropractors is in the same category as a void statute as violating the due process clause of the 14th Amendment of the Constitution.

This type of procedure was denounced in the case of *Rotan v. Greenbaum*, 273 F. 2d 830, and in *Thompson v. Louisville*, Vol. 4 L. Ed. 2d No. 9, page 654, and *Talley v. California*, Advance U. S. Supreme Court Reports, Vol. 4 L. Ed. 2d (March 28, 1960), No. 8, page 559.

Unless petitioner secures relief in this Court, he and all other Chiropractors in California will lose their right to practice Chiropractic in accordance with the license issued to them by the State of California and in accordance with the express terms of the Chiropractic Act and will be required to practice Chiropractic in accordance with the dicta of *People v. Fowler*, 32 Cal. App. 2d Supp. 737.

contrary to the terms of the Act. The constitutional rights of all Chiropractors in the State of California have been ignored by the California State Courts and their only recourse is to this Court.

Conclusion.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

NATHAN NEWBY, JR.,

Counsel for Petitioner.

NATHAN NEWBY, JR.,
Counsel of Record
354 S. Spring St.
Los Angeles 13, Calif.

Dated June 9, 1960.

APPENDIX A.

In the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles (page 102 of Certified Record).

Superior Court No. CR A 4270. People of the State of California, Plaintiff and Respondent vs. Marvin Dayan, Defendant and Appellant. Trial Court No. 98050. On Appeal from the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, Parks Stillwell, Judge.

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

It is ORDERED and ADJUDGED that the judgments and orders appealed from made and entered in the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same are hereby affirmed.

MEMO.

The trial judge correctly instructed the jury that a chiropractor may not give injections by hypodermic needle. *Brozen v. Guy* (1956), 144 Cal. App. 2d 659 at 660; *Newhouse v. Board of Osteopathic Examiners* (1958), 159 Cal. App. 2d 728 at 732; *People v. Magiadji* (1950), 97 Cal. App. 2d Supp. 935 at 940.

Those cases and *People v. Machado* (1929), 99 Cal. App. 702, *People v. Mills* (1925), 74 Cal. App. 353, In re Hartman (1935), 10 Cal. App. 2d 213, *People v. Fowler* (1938), 32 Cal. App. 2d Supp. 737, and *People*

v. *Mansfield* (1940), CR A 1749, dispose of all issues raised. It should be noted that even the *Mills* case contains the qualifying language "and it be found that he is following the system used by chiropractors." Pg. 357. The limited nature of the license not only justifies that qualification but also answers the contention that chiropractors are denied the equal protection of the law.

March 2, 1960.

SMITH
Judge

We concur:

SWAIN
Presiding Judge

HULS
Judge

In the Appellate Department of the Superior Court, County of Los Angeles, State of California (page 119 of Certified Record).

People of the State of California, Plaintiff and Respondent, vs. Marvin Dayan, Defendant and Appellant. Superior Court No. CR A 4270. Trial Court No. 98050. Order denying rehearing.

The petition of appellant for a rehearing after judgment of this court on appeal in the above-entitled case having been filed and having been duly considered,

Said petition is hereby denied.

MEMO

All issues were considered and disposed of by this court.

Dated: March 14, 1960.

By the Court

SWAIN
Presiding Judge

HULS
Judge

SMITH
Judge

Transcript of Clerk's Docket in Trial Court (Commencing at page 19 of Certified Record)

April 24, 1959.

Complaint filed sworn to R. O. Merritt charging the Defendant with having on September 6, 1958, at Los Angeles City, in the County of Los Angeles, State of California, committed a misdemeanor, to wit:

Violation Section 2141 Business & Professions Code Count I; Violation Section 2141 Business & Professions Code Count II; Violation Section 2141 Business & Professions Code Count III; Violation Section 4143 Business & Professions Code Count IV.

April 24, 1959.

Warrant issued. Bail set at $1,000.00.

May 5, 1959.

$1,000.00 surety bond approved and filed. (National Automobile & Casualty Ins. Co.).

May 6, 1959.

Warrant of Arrest filed.

May 6, 1959.

Cause called. Judge Delbert E. Wong presiding. Both parties ready. People represented by J. L. Denny, (D.C.A.) Defendant in propria persona.

Defendant in court, duly arraigned, informed of the charges against him and of his legal rights. Defendant gives true name as charged and enters his plea of not guilty of the offense charged.

Defendant in open court personally demands jury trial.

Trial set for June 12, 1959 at 9 A. M. in Division 20. Defendant personally waives statutory time for trial. Bail up to stand.

June 4, 1959.

In the following case Erwin Goodman Reporter is ordered to take down proceedings as provided by law.

Cause called. Judge David Williams presiding. Both parties ready. People represented by Jack D. Scott, (D.C.A.) Defendant in court and represented by B. Warner.

Plea set aside for purpose of filing of Demurrer.

Demurrer filed.

Trial date vacated and demurrer set for June 18, 1959 at 1:30 P.M.

Bail up to stand.

June 17, 1959.

Points and Authorities in Opposition to Demurrer, filed.

Showing service by mail on Attorney for Defendant.

June 18, 1959.

In the following case Margaret A. Olney Reporter is ordered to take down proceedings as provided by law.

Cause called. Judge David W. Williams presiding. Both parties ready. People represented by Jack D. Scott, (D.C.A.) Defendant in court and represented by B. Warner.

Cause continued for motion to June 25, 1959 at 1:30 P.M. on motion of Defendant.

Bail up to stand.

June 25, 1959.

In the following case A. Figueroa Reporter is ordered to take down proceedings as provided by law.

Cause called. Judge David W. Williams presiding. Both parties ready. People represented by Jack D. Scott, (D.C.A.) Defendant in court in propria persona.

Demurrer submitted. Demurrer overruled.

Cause continued to July 2, 1959 at 1:30 P. M. for plea.

Bail up to stand.

July 2, 1959.

In the following case Marvin D. Teplitz, Reporter is ordered to take down proceedings as provided by law.

Cause called. Judge David W. Williams presiding. Both parties ready. People represented by Jack D. Scott, (D.C.A.) Defendant in court and represented by B. Warner.

Defendant in court, duly arraigned, informed of the charges against him and of his legal rights. Defendant gives true name as charged and enters his plea of not guilty of the offenses charged.

Defendant with counsel in open court each personally demands jury trial.

Jury trial set for August 4, 1959 at 9:00 A. M. in Division 20.

Bail up to stand.

August 3, 1959.

In the following case A. Figueroa Reporter is ordered to take down proceedings as provided by law.

Cause called. Judge Gerald C. Kepple presiding. Both parties ready. People represented by Jack D. Scott, (D.C.A.) Defendant not in court but represented by B. Warner.

Motion by counsel for defendant to continue, denied.

August 4, 1959.

In this case Elena Rasmussen Reporter is ordered to take down proceedings as provided by law. Division 20 convened at 9 A. M.

Cause called. Judge Gerald C. Kepple presiding. Both parties ready. People represented by Jack D. Scott. (D.C.A.) Defendant in court and represented by B. Warner.

Transferred to Division 15 for trial.

August 4, 1959.

10 A. M.-Division 15. Continued to 2 P. M.

Cause called. Judge Vernon W. Hunt presiding. Both parties ready. People represented by H. Friedman. (D.C.A.) Defendant in court and represente by Barbara Warner. Clerk George N. Black; Reporter M. Racklin.

Defendant's motion for continuance argued. Motion granted.

Cause continued for trial in Division 20 on October 20, 1959 at 9 A. M. in Division 20.

Defendant personally waives statutory time for trial.

Bail up to stand.

August 14, 1959.

Copy of Petition for Writ of Habeas Corpus & Points & Authorities, filed. Copy mailed to County Counsel.

October 28, 1959.

Affidavit for Subpoena duces tecum, filed. Subpoena duces tecum issued.

October 30, 1959.

In this case Elias J. Papachristos Reporter is ordered to take down proceedings as provided by law. Division 20 convened at 9 A.M.

Cause called. Judge David W. Williams presiding. Both parties ready. People represented by Jack D. Scott. (D.C.A.) Defendant in court and represented by B. Warner; J. B. Nisbet, Deputy Clerk.

Transferred to Division 23 for trial.

October 30, 1959.

In this case Mack Racklin Reporter is ordered to take down proceedings as provided by law. Division 23.

Cause called. Judge Parks Stillwell presiding. Both parties ready. People represented by Harold Cutler. (D.C.A.) Defendant in court and represented by Barbara Warner.

October 30, 1959.

Following jurors sworn, examined and accepted: 1. Mr. Yves Mevel; 2. Raymond S. Edmondson; 3. Mrs. Fay Gitlin; 4. Mrs. Dean A. Bouslog; 5. Charles F. Saunders; 6. John W. King, Sr.; 7. Mrs. Helgat Ball; 8. William V. Johnson; 9. Charles E. Armstead; 10. Mrs. Christine J. Tempelaar Lietz; 11. Mrs. Louise S. Phillips; 12. Mrs. Irene D. Elliott.

Jury sworn to try the cause.

Opening statement by the People.

Witness sworn and examined, for People:

Roberta Wheeler.

People's Exhibit: "1"—Hypodermic Syringe and Needle—(for identification only).

Recess to 1:30 P. M.

Witnesses instructed to return, jury admonished.

At 1:33 P. M. Cause called. Stipulated that jury and all parties are present as before.

Witnesses sworn and examined for People: (continued)

Linda Wheeler
Lavra Edwards
Raylette Edwards
Robert O. Merritt

People's Exhibit "1" now ordered in evidence.

People rest.

Recess to November 2, 1959 at 9:30 A. M.

Jury admonished.

November 2, 1959.

Division 23— In the following case Mack Racklin Reporter is ordered to take down proceedings as provided by law.

Cause called. Judge Parks Stillwell presiding. Both parties ready. People represented by Harold Cutler, (D.C.A.) Defendant in court and represented by Barbara Warner; Helen R. Denman, Deputy Clerk:

At 9:30 A. M. Cause called. Stipulated that jury and all parties are present as before.

November 2, 1959.

Opening statement by defense.

Witnesses sworn and examined for Defendant:

Jules Bernhardt
Leslie E. Mitchell
Marvin S. Dayan

Defendant's Exhibits: (For identification only)
"A"—Photograph
"B"—Photograph

Stipulated by counsel with consent of Court that Dr. Montenegro, if called to testify, would give the same testimony as witnesses Bernhardt and Mitchell, with the same objections and same ruling.

On Court's own motion and pursuant to stipulation of counsel, the complaint is amended to show the defendant's true name to be Marvin Dayan. Under date of October 28, 1959 Subpoena Duces Tecum filed by People.

On motion of the People, Count IV is dismissed.

Defendant rests.

Cause argued, jury instructed, instructions filed.

This November 2, 1959 at 11:34 A.M. Jury retires in charge of duly sworn bailiff, George Kachin.

At 12:02 P. M. Jury returns into court with the following request:

That Court clarify a point of instruction. Count further instructs jury.

Jury retired this November 2, 1959 at 12:08 P. M. in charge of Bailiff George Kachin, duly sworn, at this 12:18 jury return into court with the following verdict:

"We, the Jury in the above entitled cause, find the defendant guilty of the offense charged in Count I , Violation of Section 2141 Business & Professions Code Count I. ,

Raymond S. Edmondson, Foreman"

Verdict filed.

Count II Jury retired this November 2, 1959 at 12:08 P.M. in charge of Bailiff George Kachin, duly sworn, at this 12:18 jury return into court with the following verdict:

"We, the Jury in the above entitled cause, find the defendant guilty of the offense charged, Violation of Section 2141 Business & Professions Code Count II.

Raymond S. Edmondson, Foreman"

Verdict filed.

November 2, 1959.

Jury retired this November 2, 1959, at 12:08 P. M. in charge of Bailiff George Kachin duly sworn, at this 12:18 jury return into court with the following verdict:

Count III

"We, the Jury in the above entitled cause, find the defendant guilty of the offense charged: Violation of Section 2141 Business & Professions Code Count III

Raymond S. Edmondson, Foreman"

Verdict filed.

Defendant waives time of sentence.

Pursuant to oral notice and motion of Defendant for a New Trial, cause continued to November 10, 1959, at 9:30 A. M. argument of motion of new trial and for sentence.

Bail up to stand.

November 10, 1959.

Division 23.

In the following case Mack Racklin Reporter is ordered to take down proceedings as provided by law.

Cause called. Judge Parks Stillwell presiding. Both parties ready. People represented by Harold Cutler, (D.C.A.) Defendant in court, and represented by Mr. Barbara Warner. Helen M. Denman, Deputy Clerk:

Continued for hearing on Motion for New Trial. Motion for New Trial, filed.

Motion argued. Motion denied.

Defendant waives time of sentence.

As to Count I

Defendant in court and having been duly arraigned for judgment, and there being no legal cause why sentence should not be pronounced. Whereupon it is ordered and adjudged by the Court this November 10, 1959, that for said offense of Violation of Section 2141 Business and Professions Code the said defend-

ant Marvin Dayan be imprisoned in the City Jail of Los Angeles City for the term of 180 days and the said defendant be discharged at the expiration of said term.

November 10, 1959.

As to Count II.

Defendant in court and having been duly arraigned for judgment, and there being no legal cause why sentence should not be pronounced. Whereupon it is ordered and adjudged by the Court that for the said offense of Violation Section 2141 Bus. & Prof. Code the said defendant Marvin Dayan be fined in the sum of 500 Dollars and that in default of the payment of said fine on or before 5 o'clock P. M. of November 10, 1959 the said defendant be imprisoned in the City Jail of said Los Angeles City in the proportion of one day's imprisonment for each and every 5 dollars of said fine until the said fine be wholly satisfied not exceeding 100 days, and that the defendant be discharged on payment of such portion of said fine as shall not have been satisfied by imprisonment at the rate above prescribed.

If the fine be unpaid, sentence to run consecutively with the sentence in Count I.

As to Count III.

Defendant in court and having been duly arraigned for judgment, and there being no legal cause why sentence should not be pronounced. Whereupon it is ordered and adjudged by the Court that for the said offense of Violation of Section 2141 Bus. & Prof. Code the said defendant Marvin Dayan be fined in the sum of 500 Dollars and that in default of the payment of

said fine on or before 5 o'clock P. M. of November 10, 1959, the said defendant be imprisoned in the City Jail of said Los Angeles City in the proportion of one day's imprisonment for each and every 5 dollars of said fine until the said fine be wholly satisfied not exceeding 100 days, and that the defendant be discharged on payment of such portion of said fine as shall not have been satisfied by imprisonment at the rate above prescribed.

If the fine be unpaid sentence to run consecutively with the sentences in Count I and Count II.

Motion of Defendant for stay of execution—denied.

Bail ordered exonerated.

November 10, 1959.

Notice of Appeal filed.

Bail on appeal set by Court at $2500.00.

Bond posted on appeal $2500.00 (Citizen Casualty Co.) approved and filed.

November 16, 1959.

Proposed Statement on Appeal filed with affidavit of service by mail.

November 27, 1959.

Substitution of Attorneys filed, substituting, Nathan Newby Jr., in place and stead of Barbara Warner.

November 30, 1959.

Reporter's Transcript filed.

December 8, 1959.

Hearing to settle Statement on Appeal is set for December 18, 1959 at 9:30 A. M. in Division 23.

Notices mailed. Affidavit of service by mail sworn and filed.

December 18, 1959.

Division 23—Cause called. Judge Parks Stillwell presiding.

Pursuant to telephone communication, by agreement, cause is continued for hearing on Statement on Appeal and Reporter's Transcript from December 18th to December 21, 1959 at 9:30 A. M.

Appeal bail to stand.

December 21, 1959.

In the following case George M. Fox Reporter is ordered to take down proceedings as provided by law.

Cause called. Judge Parks Stillwell presiding. Both parties ready. People represented by Harold Cutler, (D.C.A.) Defendant in Court and represented by Nathan Newby, Jr.

Hearing to settle Statement on Appeal and Reporter's Transcript—matter argued.

Statement on Appeal and Reporter's Transcript settled, certified and signed.

January 4, 1960.

Files on Appeal transmitted to the Appellate Department of the Superior Court.

March 14, 1960.

Remittitur returned and filed. The Judgment and Orders appealed from are affirmed.

Order from the Appellate Department of the Superior Court denying rehearing received and filed.

March 25, 1960.

Motion to Stay Execution of Judgment; Affidavit of Nathan Newby, Jr. in support of motion to stay execution of judgment; Points and authorities in support

of motion of Defendant to stay execution of Judgment, filed.

March 30, 1960.

In the following case no reporter is ordered to take down proceedings as provided by law.

Cause called. Judge Parks Stillwell, presiding. Both parties ready. People represented by H. Cutler (D.C.A.) Defendant in court in propria persona.

Defendant ordered to serve sentence as ordered previously passed by the Court.

Grants stay of execution to and including April 11, 1960.

Defendant released on his own recognizance.

Bail ordered exonerated.

April 12, 1960.

Cause called. Judge Parks Stillwell presiding. People not represented. Defendant in court and represented by Nathan Newly, Jr.

Defendant's Motion for stay of execution of Judgment granted to April 22, 1960, at 11:59 P. M.

Commitments issued.

I hereby certify that the above and foregoing is a full, true and correct copy and transcript of the docket in the within named cause.

Dated: April 27, 1960.

GEORGE J. BARBOUR,
Clerk of Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California.

By EDITH RITNER
Deputy

(Seal)

APPENDIX B.

Texts of Statutes referred to:

Section 1000. Law governing. The law governing practitioners of chiropractic is found in an initiative act entitled "An act prescribing the terms upon which licenses may be issued to practitioners of chiropractic, creating the State Board of Chiropractic Examiners and declaring its powers and duties, prescribing penalties for violation hereof, and repealing all acts and parts of acts inconsistent herewith," adopted by the electors November 7, 1922.

Section 1001. Director. In each year, the State Board of Chiropractic Examiners shall compile and may thereafter publish and sell a complete directory of all persons within the State who hold unforfeited and unrevoked certificates to practice chiropractic, and whose certificate in any manner authorizes the treatment of human beings for diseases, injuries, deformities, or any other physical or mental condition.

The directory shall contain:

(a) The following information concerning each such person:

1. The name and address of such person.
2. The names and symbols indicating his title.
3. The school, attendance at which qualified him for examination or admission to practice.
4. The date of the issuance of his certificate.

(b) The annual report of the board for the prior year.

(c) Information relating to other laws of this State and the United States which the board determines to be of interest to persons licensed to practice chiropractic.

(d) Copies of opinions of the Attorney General relating to the practice of chiropractic.

(e) Copy of the provisions of this chapter and copy of the act cited in Section 1000.

The board may require the persons designated in this section to furnish such information as it may deem necessary to enable it to compile the directory. Every person so designated shall report immediately each and every change of residence, giving both his old and new address.

The directory shall be evidence of the right of the persons named in it to practice unless his certificate to practice chiropractic has been canceled, suspended or revoked. The board may collect from each person who voluntarily subscribes to or purchases a copy of the directory the cost of publication and distribution thereof, except that one copy of the directory shall be distributed without charge to each certificate holder of the board.

Section 4052. Exceptions in general

(b) This chapter does not apply to the sale of any intravenous solution of 150 cubic centimeters or over; cold sterilizing solutions; sterilized sutures; hypodermic needles and syringes; sterile distilled water U. S. P.; sterile normal saline solution; laboratory chemicals and reagents, stains and dyes; chemicals and drugs used as indicators in diagnostic and X-ray examinations; soaps, detergents and tincture of green soap U. S. P.; medicinal gases, ether, chloroform and ethyl chloride; salta cream; ointments; and jellies used for introduction into the vaginal tract; and medicated dressings; where such sale is made to any of the following:

1. A physician, dentist, chiropodist, veterinarian, pharmacist, medical technician or medical technologist holding

a currently valid and unrevoked license to practice his profession; and a chiropractor acting within the scope of his license.

Section 4057. Products excepted

Nothing in this chapter shall apply to or interfere with the sale at wholesale or retail by grocers, dealers, persons who are not registered pharmacists, and other vendors generally without restriction of the following articles, whether or not they are otherwise exempted from the provisions of this chapter by Section 4052 or otherwise referred to therein: vitamin or mineral products or combinations thereof, dietary foods or food supplements, foods or other nutrients for dietary uses when any of such articles are sold to supplement or fortify the ordinary or usual diet of man or other animal or poultry and are labeled accordingly, and when such articles meet the requirements of the Federal Food, Drug and Cosmetic Act and the food laws of the state of California; Glauber salt, petroleum jelly, turpentine, cod-liver oil, milk of magnesia, condition powders, cream of tartar, carbonate of soda, bay rum, essence of peppermint, ammonia, alum, castor oil, bicarbonate of soda, chloride of lime, glycerin, witch hazel, sheep dip, borax, sulfur, aspirin tablets, gauze bandage, mineral oil, steril cotton, medicated adhesive and corn plasters, peroxide of hydrogen, 10 volume, bluestone, copperas, flaxseed, insect powder, flypaper, unmedicated corn plasters, unmedicated adhesive plasters, epsom salts, saccharin, and poultry vermifuge.

Section 1600-1. Board of examiners—membership, appointment, qualifications, per diem expenses. A board is hereby created to be known as the "state board of chiropractic examiners," hereinafter referred to as the board, which shall consist of five members, citizens of the State

of California appointed by the governor. Each member must have pursued a resident course in a regularly incorporated chiropractic school or college, and must be a graduate thereof and hold a diploma therefrom.

Each member of the board first appointed hereunder shall have practiced chiropractic in the State of California for a period of three years next preceding the date upon which this act takes effect, thereafter appointees shall be licentiates hereunder. No two persons shall serve simultaneously as members of said board whose first diplomas were issued by the same school or college of chiropractic, nor shall more than two members be residents of any one county of the state. And no person connected with any chiropractic school or college shall be eligible to appointment as a member of the board. Each member of the board except the secretary, shall receive a per diem of ten dollars for each day during which he is actually engaged in the discharge of his duties together with his actual and necessary traveling expenses incurred in connection with the performance of the duties of his office, such per diem, traveling expenses and other incidental expenses of the board or of its members to be paid out of the funds of the board hereinafter defined and not from the state's taxes.

Section 1000-4. Powers of Board. Duties of Board. The board shall have power:

(a) To adopt a seal, which shall be affixed to all licenses issued by the board.

(b) To adopt from time to time such rules and regulations as the board may deem proper and necessary for the performance of its work. Copies of such rules and regulations to be filed with the Secretary of State for public inspection.

(c) To examine applicants and to issue and revoke licenses to practice chiropractic, as herein provided.

(d) To summon witnesses and to take testimony as to matters pertaining to its duties; and each member shall have power to administer oaths and take affidavits.

(e) To do any and all things necessary or incidental to the exercise of the powers and duties herein granted or imposed.

(f) To determine minimum requirements for teachers in chiropractic schools and colleges.

(g) To approve chiropractic schools and colleges whose graduates may apply for licenses in this State. Any school meeting the requirements of Section 5 of this act and the rules and regulations adopted by the board shall be eligible for such approval.

(h) The board may employ such investigators, clerical assistants, and other employees as it may deem necessary to carry into effect the provisions of this act, and shall prescribe the duties of such employees.

Section 1000-5. License to practice, application, fee, certificate, educational requirements. LICENSE TO PRACTICE; FEE; EDUCATIONAL REQUIREMENTS. It shall be unlawful for any person to practice chiropractic in this State without a license so to do. Any person wishing to practice chiropractic in this State shall make application to the board 15 days prior to any meeting thereof, upon such form and in such manner as may be provided by the board. Each application must be accompanied by a license fee of twenty five dollars ($25) and a certificate showing good moral character of the applicant. Except in the cases herein otherwise prescribed, each applicant shall be a graduate of an approved chiropractic

school or college which teaches a course of not less than 4000 hours, extended over a period of four school terms of at least nine months each, and shall present to the board at the time of making such application a diploma from a high school, or proofs satisfactory to the board of education equivalent in training power to a high school course.

The schedule of minimum educational requirements to entitle any person to practice chiropractic in this State is as follows, except as herein otherwise provided.

Group 1	
Anatomy, including embryology and histology	18 to 20%
Group 2	
Physiology	6 to 8%
Group 3	
Biochemistry, inorganic and organic chemistry	6 to 8%
Group 4	
Pathology and bacteriology	10 to 12%
Group 5	
Public Health, hygiene and sanitation	3 to 4%
Group 6	
Diagnosis, pediatrics, dermatology, syphilogy and psychiatry	12 to 18%
Group 7	
Obstetrics and gynecology	3 to 4%
Group 8	
Principles and practice of chiropractic, physiotherapy and office procedure	23 to 28%
Total	83 to 100%
Electives	17 to 0%

Section 1000-6. Board of examiners, meetings, offices, examinations. (a) The board shall meet as a board of examiners on the first Tuesday following the second Monday of January and July of each year, and at such other times and places as may be found necessary for the performance of their duties. The office of the board shall be in the city of Sacramento. Sub-offices may be established in Los Angeles and San Francisco, and such records as may be necessary may be transferred temporarily to such sub-offices. Legal proceedings against the board may be instituted in any one of said three cities.

(b) Each applicant shall be designated by a number instead of the name, so that the identity will not be disclosed to the examiners until the papers are graded.

(c) All examinations shall be in writing, except in cases herein otherwise prescribed, and shall be practical in character, as taught in chiropractic schools or colleges, and designed to ascertain the fitness of the applicant to practice chiropractic. Said examinations shall be in each of the subjects as set forth in section five hereof. A license shall be granted to any applicant who shall make a general average of seventy-five per cent, and not fall below sixty per cent in more than two subjects or branches of said examination. Any applicant failing to make the required grade shall be given credit for the branches passed, and may, without further cost, take the examination at the next regular examination on the subjects in which he failed. For each year of actual practice since graduation the applicant shall be given a credit of one per cent on the general average.

Section 1000-7. License to practice, issuance; practice authorized. One form of certificate shall be issued by the board of chiropractic examiners, which said certificate

shall be designated "License to practice chiropractic," which license shall authorize the holder thereof to practice chiropractic in the State of California as taught in chiropractic schools or colleges; and, also, to use all necessary mechanical, and hygienic and sanitary measures incident to the care of the body, but shall not authorize the practice of medicine, surgery, osteopathy, dentistry or optometry, nor the use of any drug or medicine now or hereafter included in materia medica.

Section 1000 1/2. Noncompliance with and violations of act. Any person who shall practice or attempt to practice chiropractic, or any person who shall buy, sell or fraudulently obtain a license to practice chiropractic, whether recorded or not, or who shall use the title "chiropractor" or "D. C." or any word or title to induce, or tending to induce belief that he is engaged in the practice of chiropractic without first complying with the provisions of this act; or any licensee under this act who uses the word "doctor" or the prefix "Dr." without the word "chiropractor," or "D. C." immediately following his name, or the use of the letters "M. D." or the words "doctor of medicine," or the term "surgeon," or the term "physician," or the word "osteopath," or the letters "D. O." or any other letters, prefixes or suffixes, the use of which would indicate that he or she was practicing a profession for which he held no license from the State of California, or any person who shall violate any of the provisions of this act, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than fifty dollars and not more than two hundred dollars, or by imprisonment in the county jail for not less than thirty days nor more than ninety days or both.

Section 1000-18. Repeal of conflicting provisions in medical practice act. Nothing herein shall be construed as repealing the "medical practice act" of June 2, 1913, or any subsequent amendments thereof, except in so far as that act or said amendments may conflict with the provisions of this act as applied to persons licensed under this act, to which extent any and all acts or parts of acts in conflict herewith are hereby repealed.

APPENDIX C.

Pertinent Portions of the Reporter's Transcript Reflecting Errors of Court in Denying Admission of Evidence.

(Appearing in Certified Record pages 192 to 217.)

Los Angeles, California, Monday, November 2, 1959; 9:30 AM.

The Court: It is stipulated, counsel, that the Jury is present?

Mrs. Warner: Yes.

Mr. Cutler: So stipulated.

The Court: You may proceed, Mrs. Warner, with your defense. Do you care to make an opening statement?

Mrs. Warner: We will proceed with our opening statement. We have three witnesses in the courtroom. May they remain until we start our evidence?

The Court: Surely. Do you have any objection?

Mr. Cutler: Your witnesses may remain; I have no objection.

(Whereupon an opening statement was made by counsel for the defendant, which is not herein transcribed.)

The Court: You may call your first witness.

Mrs. Warner: The defendant will call Mr. Bernhardt as their first witness.

JULES BERNHARDT,

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows, to wit:

The Clerk: State your name, please.

The Witness: Jules Bernhardt.

Direct Examination

By Mrs. Warner:

Q. What is your business or occupation? A. I am a Doctor of Chiropractic.

Q. How long have you been a Doctor of Chiropractic?

A. Approximately thirteen years.

Q. And what is your present position as a Doctor of Chiropractic? A. Well, I am in practice and also am a faculty member at the Los Angeles College of Chiropractic.

Q Now, as a member of the faculty of the Los Angeles College of Chiropractic, do you know the various courses offered at the College?

Mr. Cutler: I will stipulate that he is an expert, your Honor.

The Witness: Yes, I do.

Q. By Mrs. Warner: Assuming, for the purposes of this question, that B Complex was administered with a hypodermic syringe for a patient suffering from malnutrition, arising out of acute alcoholism, is this technique taught in the Los Angeles College of Chiropractic?

Mr. Cutler: That is objected to as being immaterial, your Honor.

The Court: Sustained.

Mrs. Warner: We would like to make an offer of proof your Honor.

The Court: Ladies and gentlemen of the Jury, we are not in recess. I will ask you to remain in your places, if you please, until we return from chambers.

I will ask you not to discuss this matter nor to form any conclusions or opinions on it until the matter has finally been submitted to you.

(Whereupon the following proceedings were had in chambers, outside of the presence of the Jury:)

The Court: You may proceed, counsel.

Mrs. Warner: We would offer to prove by the testimony of Dr. Bernhardt, that the giving of a shot of B Complex with a hypodermic syringe is included in the various techniques taught at the Los Angeles College of Chiropractic and that such methods are required by the State Chiropractic Act, Sections 5 and 7, to be taught by said College before the student may be licensed to practice the art of Chiropractic.

Mr. Cutler: I will make my objection that it is immaterial as to what is taught in the school itself, with respect to what the Doctor may do under the license and within the purview of the Medical Practice Act. It is what he is authorized under the law to do, under the license, and under 2141 of the Business and Professions Code of the State of California.

The Court: May I say this, that in my research on this problem, I came to this conclusion: In the case of the People against Mangiagli 97 Cal. App. 2d. Supplement, at page 959, the Court says this:

"As we held in the Fowler case, at 32 Cal. App. 2d. Supplement 750, the limiting clause of Section 7, numbered above as (3), prevents a chiropractic licensee from using drugs or medical preparations or severing or penetrating the tissues of human beings."

It seems to me it has been specifically held that a chiropractor, as such, has no right to give shots or injections of any kind. If that be the case, it would seem to me to be immaterial what they teach in the schools and besides that the law seems to be quite clear that only what was being taught in 1922, when the Chiropra... Act was

adopted, are those things which are included in Section 7 and even some of the things that may have been taught are excluded also, but what they are teaching now in the Chiropractic colleges would have nothing to do with what a chiropractor may, under the law, perform or do.

Mrs. Warner: As I understand the Prosecutions's objection, then, it is because he believes the evidence is being offered to expand the license, as such; is that correct, Mr. Cutler?

The Court: The evidence is immaterial, it is, his contention, to the issues here involved.

It seems to me that the only question involved here, Mrs. Warner, is did he or did he not on these dates indicated give injections or vaccinations. It is my opinion that he is, under the law, forbidden and prohibited from doing either of these acts at any time, as a chiropractor.

Mrs. Warner: It isn't quite as strict as that. Actually he may use any mechanical hygiene or sanitary measures that are necessary for the healthful maintenance of a body.

The Court: The Courts have specifically held he may not penetrate the tissue.

Mrs. Warner: That is for surgery. The Mangiagli case is an intravenous injection, if you will check it and I believe you will find that it was an intravenous injection into a vein. There is a great deal of difference between an intravenous injection and one given into the tissues as a food supplement.

The Court: Let me read further:

"But however that may be, it is clear that the other acts done, the administration of blood plasma and the hypodermic injection, when done for the treatment of ailment, disease, or other physical condition, are not such

mechanical, hygienic or sanitary measures incident to the care of the body, as may be used by chiropractic licensees."

Mrs. Warner: Your key matter in the Mattaugh case is there was a diagnosis of a disease and a treatment of a disease.

The Court: Acute alcoholism is not a disease?

Mrs. Warner: No; it is a health problem. It is not considered a disease. Malnutrition is not a disease.

The Court: Are the children alcoholics?

Mrs. Warner: No, it is malnutrition in thier case.

The Court: And it is not a disease?

Mrs. Warner: It is a deficiency of the body. As your Honor, under vaccinations, you will find that under the Chiropractic Act, a chiropractor is required to do any public health measures, to take any public health measures required and as such a vaccination comes under that section and also comes under our hygiene and sanitary sections.

The Court: Required by whom?

Mrs. Warner: By law to follow the public health measures.

The Court: Is there anything in the law that requires a person to be vaccinated?

Mrs. Warner: A child must be vaccinated for smallpox before they can enter school.

Mr. Cutler: I will object to that. It is not within the Medical Practices Act, or the cases as they now stand.

Mrs. Warner: That is what we contend, on the evidence that we are offering. We are not offering the testimony of Dr. Bernhardt for the purpose of setting

ing his license. We are offering it to show his intent in giving these injections. We believe that under that theory it becomes very material as to what he was taught in school.

Mr. Cutler: If I may add one other matter, with respect to the intent involved, there is no specific intent involved in the first three counts. It is a crime of general criminal intent. The fact that he did the act is sufficient to establish the intent.

Mrs. Warner: I disagree with that concept of the law.

The Court: It will be my practice here, in this case, to limit the evidence, as I have indicated it, if objections are made. It is my opinion, Mrs. Warner, that no matter what they teach in the Chiropractic schools, no matter what he thought he was doing, if he penetrated human tissue, it is my opinion that he is engaged in the unauthorized practice of medicine, unless he is licensed either as a medical doctor or a doctor of osteopathy.

No matter what his great purpose or altruistic intent, what that may have been, I think the law specifically prohibits a chiropractor from this type of activity.

Mrs. Warner: Would that include the taking of blood?

The Court: My understanding is and I have indicated to Mr. Cutler, and he to me, that as soon as it is indicated or proved that the man is a chiropractor, that he, Mr. Cutler, intends to dismiss Count IV. He feels the Doctor has a right to have this instrument in his posession, if he is a licensed chiropractor. But it is my opinion that he may not use it for the purpose which he allegedly did here.

Mrs. Warner: For penetration of any kind?

The Court: I understand the taking of blood is proper by a chiropractor.

Mrs. Warner: That is a penetration too.

The Court: It would have to be a penetration. I don't think he had any right to give any injections for any purpose, whether they be B Complex vitamins or polio shots or whatever they may have been.

Mrs. Warner: Well, that is our lawsuit.

The Court: We have to take a stand on it and that is my understanding, as I read the cases. I do not claim to be an expert on matters concerning Chiropractic, but apparently, his ability to operate is considerably limited. I gather that this is one of the limitations.

Mrs. Warner: His limitations are by his license and if he is acting within the scope of a hygienic, sanitary or mechanical measure, he is within the scope of his license.

The Court: This case specifically provides it is not one of those. It says "Any hypodermic injection."

I would gather that would be whether muscular or intravenous or whatever it may be.

Mr. Cutler: If I might add, your Honor, the distinction is and my understanding of it is, and this is after talking to the people at the Medical Examiners Board, the distinction between giving an injection and drawing blood is a simple one, in that one involves putting a substance into the body and this is the thing which involves the practicing of an act as a medical doctor. Withdrawing blood is not such a type of a situation and adding any substance to the body is what is particularly the distinction between allowing him to take blood, such as for the purposes of having tests run on it, and adding a substance to the body.

The Court: That will be my holding, whether right or wrong.

Mrs. Warner: We have additional evidence to be offered by the Doctor. Shall we just go through the same procedure?

The Court: However you want to do it to make your record. This is the general procedure that I will follow.

Mrs. Warner: Very well, your Honor.

(Whereupon the following proceedings were had in open court:)

The Court: Let the record show that we are back now in open court and that the Jury is present as before. You may proceed, Mrs. Warner. If I did not sustain the objection to the offer of proof, I now do so. I thought I did. By implication I guess I did.

Mr. Cutler: Had your Honor ruled on the objection?

The Court: I sustained it and now if I did not do it before I will sustain the objection to the offer of proof.

Direct Examination (Continued)

By Mrs. Warner:

Q. Doctor, in your opinion as a Doctor of Chiropractic, is B Complex a type of food supplement, sir?

A. Yes, it is.

Q. And is the giving of B Complex, in your opinion a method of hygienic care of the body?

Mr. Cutler: Just a moment, please. I will object to that as immaterial.

The Court: Read the question, Mr. Reporter.

(Record read.)

Mr. Cutler: May I further, your Honor, state another ground for the objection, in that the question is ambiguous.

The Court: It does not seem to me to be ambiguous. I see no objection to it. It may be answered. The objection is overruled.

The Witness: Yes, it is an hygienic measure.

Q. By Mrs. Warner: Doctor, are methods of vaccination taught in the Chiropractic colleges?

Mr. Cutler: That is objected to as being immaterial.

The Court: Sustained.

Q. By Mrs. Warner: Doctor, is the giving of a vaccination, in your opinion, a hygienic measure? A. Yes.

Mr. Cutler: That is objected to as being immaterial, if the Court please.

The Court: The answer may go out for the purpose of the objection. The objection will be sustained.

The Jury is admonished not to consider it for any purpose.

Mrs. Warner: We would like to make another offer of proof.

The Court: I understand what it will be. The question was asked and the answer was in and it was stricken. Isn't that sufficient?

Mrs. Warner: We will let it go. You may cross-examine.

The Court: You may cross-examine, Mr. Cutler.

Mr. Cutler: No questions.

The Court: You may step down, Doctor.

Mrs. Warner: Dr. Mitchell, please.

LESLIE E. MITCHELL,

called as a witness by and on behalf of the defendant, being first duly sworn, was examined and testified as follows, to wit:

The Clerk: State your name, please.

The Witness: Leslie E. Mitchell.

Direct Examination

By Mrs. Warner:

Q. Dr. Mitchell, what is your business or occupation?

A. I am a Doctor of Chiropractic and presently the Registrar of the Los Angeles College of Chiropractic.

Q. How long have you been a Doctor of Chiropractic?

A. Since 1951.

Q. Do you practice here in the State of California?

A. I have practiced here, yes.

Q. Do you know the various courses offered at the College of Chiropractic, the Los Angeles College of Chiropractic? A. I do.

Q. In such courses is the use of a hypodermic needle taught in the school?

Mr. Cutler: That is objected to as being immaterial.

The Court: Sustained.

Mrs. Warner: Your Honor, we will make another offer of proof on this.

The Court: May we assume, counsel, that it will be in the nature of the last one, or do you wish, at this time, to make a separate offer of proof.

Mrs. Warner: If counsel will stipulate that it may be the same as the last offer of proof—

The Court: If you tell us that is your offer of proof he does not have to stipulate to it. You make the same offer of proof from this witness that you made from the last: is that correct?

Mrs. Warner: That is true, yes.

Mr. Cutler: Then I will again object to it as being immaterial.

The Court: The objection is sustained.

Q. By Mrs. Warner: Now, Doctor, in your opinion, as a Doctor of Chiropractic, is a B Complex a food supplement? A. It is, yes.

Q. Is the administration of B Complex a hygienic measure for the care of the body?

Mr. Cutler: That is objected to as being immaterial.

The Court: The objection is overruled. You may answer the question.

The Witness: It is.

Q. By Mrs. Warner: Is the giving of vaccinations, is this also considered to be a hygienic measure?

Mr. Cutler: I will object to that as being immaterial.

The Court: That objection is sustained.

Mrs. Warner: That is all. You may cross-examine.

The Court: You may cross-examine, Mr. Cutler.

Cross-Examination

By Mr. Cutler:

Q. Are you familiar with the various things that are listed in Materia Medica?

Mrs. Warner: That is objected to as being incompetent irrelevant and immaterial and as being beyond the scope of the direct examination.

The Court: Sustained.

Mr. Cutler: No further questions.

The Court: You may step down.

Mrs. Warner: Dr. Dayan, will you take the stand, please.

the defendant herein, called as a witness by and on his own behalf, being first duly sworn, was examined and testified as follows, to wit:

The Clerk: State your name, please.

The Witness: Maryin S. Dayan, D.C.

Direct Examination

By Mrs. Warner:

Q. Dr. Dayan, where do you reside? A. In Los Angeles.

Q. What is your business or occupation? A. Doctor of Chiropractic.

Q. How long have you been a Doctor of Chiropractic? A. Since 1951.

Q. What school did you attend, sir?

Mr. Cutler: I will stipulate he is a expert—strike that.

Mrs. Warner: We are not using him for the purposes of expert testimony.

Mr. Cutler: Then I will object to it as being immaterial. What schools he went to would be immaterial.

The Court: Sustained.

Q. Mrs. Warner: Were you licensed by the State of California? A. Yes, I was.

Q. I will show you a framed document that states "State Board of Chiropractic Examiners, License to Practice Chiropractic, Number 8475." and I will ask you to look at that document, sir. Have you examined the document? A. Yes.

Q. Is this your license that was issued by the State Board of Chiropractic? A. Yes, it was. It is, yes.

Mrs. Warner: I would like to offer this into evidence as defendant's Exhbit A.

The Court: May I suggest rather than doing that, that he may have use for it in the future. Why don't you read it into the record.

Mrs. Warner: We would like the Jury to have a right to see the license. We will substitute a photostatic copy.

The Court: Do you have one? If it is in the usual form, may I suggest that it be made available for the Jury's perusal rather than have it introduced into evidence. It has a number and it is easily identifiable. I think it might be made available and not offered.

Mrs. Warner: We will make it available then.

Mr. Cutler: May I read it before the other one is made available?

The Court: Yes, you may read it, counsel.

Q. By Mrs. Warner: Directing your attention to September 6th, October 11th and October 29th, did you have an opportunity on those dates to see Mrs. Wheeler? A. Yes, I did.

Q. And her daughter? A. Yes.

Q. What is her daughter's name? A. Linda.

Q. Did you also see Mrs. Edwards on those dates? A. Yes, I did.

Q. And who else besides Mrs. Edwards? A. Several of her children.

Q. Can you recall which child—

The Court: Or children.

The Witness: Raylette, the one that was here the other day, Ricardo, I believe, and another daughter. I don't recall her name; Rozelle, I believe.

Q. By Mrs. Warner: Now, directing your attention to the office calls of Mrs. Wheeler and her child, Linda, on these three dates, the three office calls, did you make a diagnosis of the problems of Mrs. Wheeler? A. Yes, I did.

Q. And what was your diagnosis? A. Debility, general malnutrition fatigue, et cetera.

Q. Was that applicable also to the child? A. Yes.

Q. Now, directing your attention to Mrs. Wheeler, what was the cause of the debility and of the malnutrition?

Mr. Cutler: I will object to that as being immaterial. No foundation has been laid. This man is not an expert.

The Court: Mr. Cutler, was there a stipulation that he is licensed as a Doctor of Chiropractic? I think that is ample.

Mr. Cutler: May I have the question reread?

(Record read.)

Mr. Cutler: I will object to that as being immaterial and no foundation having been laid. He is not qualified to give his opinion as to that.

The Court: Overruled. The witness may answer the question.

Q. By Mrs. Warner: Do you remember the question, Doctor? A. I don't believe so.

The Court: It may be read again.

(Record read.)

The Court: "In your opinion," I presume should have been added to that.

The Witness: Chronic alcoholism.

Q. By Mrs. Warner: Now, directing your attention to Mrs. Wheeler's daughter, Linda, what was the cause

of the malnutrition in Linda, in your opinion, Doctor? A. Her general debility and malnutrition was caused from not having the proper food, poor diet, et cetera.

Q. As to Mrs. Edwards, tell us what was, in your opinion, the cause of her problems?

Mr. Cutler: I will object to that question, your Honor.

The Court: It is too broad.

Q. By Mrs. Warner: What was your diagnosis as to Mrs. Edwards, Doctor? A. Fatigue, general tiredness and malnutrition.

Q. Did that apply also to her children? A. To her children, yes.

Q. Were her children underweight? A. Yes; frequent colds and things like that.

Q. Now, Doctor, you have heard Mrs. Wheeler, her daughter, Linda, Mrs. Edwards and her daughter Raylette, testify that they received shots on September 6th, October 11th and October the 29th from you; is that correct, sir? A. That is correct.

Q. What type of shots were given to these witnesses?

Mr. Cutler: That is objected to, your Honor, as also being immaterial.

The Court: Sustained.

Mrs. Warner: We would like to make an offer of proof on that matter.

The Court: Let's do it here at the bench.

(Whereupon the following proceedings were had at the bench:)

Mrs. Warner: We would offer to prove by the testimony of Dr. Dayan that a B Complex injection was given to the four witnesses on the dates in questions and that such was given as a food supplement.

Mr. Cutler: I will make the same objection to the offer of proof as was heretofore made.

The Court: The objection is sustained.

(Whereupon the following proceedings were had in open court:)

Q. By Mrs. Warner: Are you presently being sued by Mrs. Wheeler? A. Yes, I am.

Q. And prior to this lawsuit, were demands made upon you for money? A. Yes.

Q. How much was demanded from you? A. $1,000.

Q. What are you being sued for now? A. $25,000.00.

Q Have you received any payments for your treatment to these people?

Mr. Cutler: That is objected to as being immaterial.

The Court: Sustained.

Q. By Mrs. Warner: Were you threatened by Mrs. Wheeler with a lawsuit if you didn't pay her some money? A. Yes, I was.

Q. And after she made these financial demands upon you, did she then go to the Police? A. Yes.

Q. Doctor, as part of your treatment for these four witnesses, did you administer a B Complex injection to them? A. Yes, I did.

Q. And those injections were administered on September 6th, October 11th and October 29th; is that correct? A. Yes.

Q. Were they given as a food supplement, sir? A. Yes.

Mr. Cutler: I will ask that the answer be stricken for the purpose of making an objection.

The Court: The answer may go out.

Mr. Cutler: It is objected to as being immaterial.

The Court: I will admonish the Jury not to consider it for any purpose. The objection will be sustained.

Q. By Mrs. Warner: Was the administering of B Complex as a food supplement taught to you during your course as a student? A. Yes, it was.

Mr. Cutler: Again I will ask that the answer be stricken for the purpose of making an objection.

The Court: The answer may go out. The jury will be admonished not to consider it for any purpose.

Mr. Cutler: I will object to it on the grounds that it is immaterial and irrelevant.

The Court: The objection will be sustained. I will ask the witness, since we are in an area where objections are being interposed, to kindly let the objection be made before you answer.

The Witness: Yes, your Honor.

Q By Mrs. Warner: Doctor, when you treated Mrs. Wheeler and her daughter, did you make out any forms for their treatment? A. Yes.

Q. Who were these forms for, Doctor? A. The Los Angeles County Welfare Department.

Q. And were they sent to the County Welfare Department?

Mrs. Warner: Defendant's Exhibit A for identification, that will be the first one. Then this next one could be defendant's Exhibit B. The others, I believe, are just duplicates. Yes, they are just duplicates.

The Court: Let these be marked for identification then as defendant's Exhibit A and B.

The objection will be sustained as to the offer of proof.

(Whereupon the following proceedings were had in open court:)

The Court: You may proceed.

Mrs. Warner: You may cross-examine.

Cross-Examination

By Mr. Cutler:

Q. Doctor, you testified that Mrs. Wheeler and Mrs. Edwards and their children received shots on these various dates: is that right? A. That is correct.

Q. Do you mean by that the injection of a substance into the body? A. Yes, I do.

Q. Now, you say you diagnosed Mrs. Wheeler's condition as alcoholism, acute alcoholism? A. She was suffering from malnutrition, debility and fatigue. It was due to alcoholism.

Q. And what method did you use to arrive at this particular deduction?

Mrs. Warner: That is objected to as being irrelevant and immaterial and not covered on direct examination.

The Court: Overruled. You may answer.

The Witness: Examination, primarily a history that she gave, and also a history of Mrs. Edwards, of them both drinking together, et cetera.

Q. By Mr. Cutler: Did you perform any type of scientific tests to arrive at this deduction? A. No, I did not, because the County did not substantiate her eligibility under the Welfare Plan.

Q. Now, I believe you made the statement that after Mrs. Wheeler made her financial demands upon you she went to the Police? A. No, she went to the Medical Board about two months after I received a letter from a lawyer asking me for money.

Q. Do you recall what the contents of that letter was?

Mrs. Warner: Objected to as violating the best evidence rule. It is also immaterial and irrelevant.

The Court: The objection is overruled. You may answer It calls for a yes or no answer, Do you

APPENDIX D.

Manner in Which Federal Questions Were Raised:

COMPLAINT

(Pages 4 and 5 of Certified Record.)

Personally appeared before me, the undersigned, who, first being duly sworn, complains and says: That on or about September 6, 1958, at and in Los Angeles City, in the County of Los Angeles, State of California, a misdemeanor, to-wit:

Violation of Section 2141 of the Business and Professions Code of the State of California was committed by Marvin Dayon (whose true name to affiant is unknown), who at the time and place last aforesaid, did wilfully and unlawfully in the City of Los Angeles, practice and attempt to practice, and advertise and hold himself out as practicing, a system and mode of treating the sick and afflicted without having at the time of so doing a valid unrevoked certificate issued by the Board of Medical Examiners of the State of California, or the Board of Osteopathic Examiners of said State, authorizing him so to do.

COUNT II.

For a further, separate and second cause of action, being a different offense connected in its commission with the offense set forth in Count I hereof, affiant complains and says: That on or about October 11, 1958, at and in the City of Los Angeles, in the County of Los Angeles, State of California, a misdemeanor, to wit: Violation of Section 2141 of the Business and Professions Code of the State of California was committed by Marvin Dayon (whose true name to affiant is unknown), who at the time

and place last aforesaid, did wilfully and unlawfully in the City of Los Angeles, practice and attempt to practice, and advertise and hold himself out as practicing, a system and mode of treating the sick and afflicted without having at the time of so doing a valid unrevoked certificate issued by the Board of Medical Examiners of the State of California, or the Board of Osteopathic Examiners of said State, authorizing him so to do.

COUNT III.

For a further, separate and third cause of action, being a different offense, belonging to the same class of crimes and offenses set forth in Count I and II hereof, affiant complains and says: That on or about the 29th day of October 1958, at and in Los Angeles City, in the County of Los Angeles, State of California, a misdemeanor, to-wit: Violation of Section 2141 of the Business and Professions Code of the State of California was committed by Marvin Dayon (whose true name to affiant is unknown), who at the time and place last aforesaid, did wilfully and unlawfully in the City of Los Angeles, practice and attempt to practice, and advertise and hold himself out as practicing a system and mode of treating the sick and afflicted without having at the time of so doing a valid unrevoked certificate issued by the Board of Medical Examiners of said State of California, or the Board of Osteopathic Examiners of said State, authorizing him so to do.

All of which is contrary to the law in such cases made and provided, and against the peace and dignity of the People of the State of California. Said Complainant therefore prays that a warrant may be issued for the arrest

of said Defendant that he may be dealt with according to law.

Subscribed and sworn to before me on April 24, 1959.

R. O. MERRITT
R. O. Merritt

George J. Barbour, Clerk of the Municipal Court of Los Angeles Judicial District, in said County and State.

By FRANCIS P. O'KEEFE
Deputy Clerk

June 11, 1959. I hereby certify this to be a true and correct copy of the original Complaint on file in this office George J. Barbour; Clerk of Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California.

By EDITH RITNER
Deputy

(Pages 9 and 10 of Certified Record.)

In the Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California.

People of the State of California, Plaintiff, vs. Marvin S. Dayan, Defendant. No. 98050.

DEMURRER TO COMPLAINT.

Comes now the defendant, and demurrers to the complaint herein on the following grounds.

I.

That said complaint, and no cause of action contained therein sets forth facts sufficient to state a public offense, against defendant, a licensed chiropractor.

II.

That the court does not have jurisdiction of the purported offense charged.

III.

That the complaint does not conform to the provisions of Sections 950, 952, and 954 Penal Code, in that said complaint does not set forth words sufficient to give the defendant notice of which he is accused.

IV.

That the complaint herein, is void, and in violations of Art. I, Sec. 13 of the California Constitution, and of the 14th Amendment, U. S. Constitution.

Wherefore, defendant prays that his demur be sustained, and that the cause herein be dismissed, for failure to state a public offense, and because of each of jurisdiction of the court to proceed.

Dated: this 4th day of June, 1959.

/s/ BARBARA WARNER
BARBARA WARNER
Attorney for Defendant.

(Page 11 of Certified Record.)

POINTS AND AUTHORITIES

Point I

Complaint Deprives Defendant of Due Process

"Notice of the specific charge against the defendant is a Constitutional right of the accused."

Schauer, J., *People v. Pond* (1955), 44 Cal. 2d 665.

Point II

Chiropractic Act Repealed Section 2141, B & P Code as to Chiropractors

The complaint attempts to charge practice of medicine without a license in violation of Section 2141 of the Business and Professions Code. It does not charge a public offense, for petitioner as a licensed chiropractor was authorized to do the very acts charged in the complaint as criminal. The complaint does not negative the possession by petitioner of an unrevoked chiropractic license. Any criminal prosecution should have been pursuant to Section 15, Chiropractic Act.

Section 18 of the Chiropractic Act repealed the penal provisions of the Medical Practice Act, as to Chiropractors, see

Section 1000 B & P Code;

People v. Gaylor, (dissenting opinion);

Appellant Department No. Cr. A 1226; opinion dissenting by Justice Schauer;

People v. Willis (1923), 62 C. A. 717.

The legislature has consistently dealt with chiropractors as a professional class, separate and apart from other professional groups.

Sections 1000 and 1001, B & P Code;

Sections 3209.5 and 3209.6 Labor Code;

Sections 2573 Health and Safety Code Contra:

People v. Fowler (1938), 22 C. A. 2d (Supp.) 737.

Point IV

Section 4143 B & P Code Does Not Apply to Chiropractors

Section 4052 B & P Code provides in part:

"This chapter does not apply to the sale of any . . . hypodermic needles and syringes . . . where such sale is made to any of the following:

I. . . . and a chiropractor acting within the scope of his license."

It follows that Count IV is insufficient, in that it does not negative the foregoing language, or that defendant is not a licensed chiropractor.

Conclusion

The language of *Ex parte McNulty* (1888), 77 Cal. 164, applies to the instant case, as follows:

"Constructive crimes—crimes built up by courts with the aid of inference, implication, and strained interpretation are repugnant to the spirit and letter of English and American criminal law."

See also, *People v. Zimbrolt* (1939), 35 C. A. 2d (Supp.) 745; and Douglas, J., *United States v. Cardiff*

(1952), 73 S. Ct. 189. The instant charge amounts to an attempt to create a common law crime by judicial interpretation. See, Houser, J., in *People v. Whipple* (1929), 100 C. A. 261; at 262, where he states the rule against such constructive crimes, stating:

"In this state the common law is of no effect so far as the specification of what acts or conduct shall constitute a crime is concerned. (Sec. 6, Pen. Code)."

The demurrer should be sustained, and the complaint dismissed.

/s/ BARBARA WARNER
Barbara Warner
Attorney for Defendant

(Page 13 to 17 incl. of Certified Record.)

In the Municipal Court of Los Angeles Judicial District County of Los Angeles, State of California.

People of the State of California, Plaintiff and Respondent, vs. Marvin Dayan aka. Marvin Dayon, Defendant and Appellant. No. 98050.

PROPOSED STATEMENT ON APPEAL

Be it remembered that on the 24th day of April, 1959, a complaint was filed herein charging defendant with the violation of Section 2141 Business and Professions Code in Counts I, II, and III, and with a violation of Section 4143 Business and Professions Code in Count IV, which Count IV was dismissed during the trial. Defendant's demurrer was over-ruled, and he was tried and was convicted by a jury on Counts I, II, and III, presided over by the Honorable Parks Stillwell, Judge Presiding. Defendant's motion for a new trial was denied, and defendant was sentenced to serve six months on Count I, and to pay a fine of $500.00 on both Counts II and III, or to serve an additional 100 days on each of said Counts II and III, consecutively, if the said fines be not paid. Defendant previous to sentence orally applied for probation which motion was denied.

Defendant appealed from the judgments of conviction, and from the orders denying the motion for a new trial, and the motion for probation.

Notice Re Rule 4 (a) Rules on Appeal

The entire trial proceedings including the instructions given to the jury were reported by an official reporter. Defendant has ordered the transcription of the record. Notice is hereby given that defendant intends to file the

reporter's transcript of the evidence and proceedings so reported and to make them a part of this statement. Defendant in reliance thereon, omits any other statement of the evidence and oral proceedings herein.

The prosecution offered and the court received into evidence a single Exhibit consisting of a hypodermic syringe, Exhibit 1. Defendant offered into evidence two photos, Exhibits A and B, for identification, and his Chiropractic License, which offers were refused, except defendant was permitted to refer to said license, but denied the right to exhibit the same to the jury.

That each of the six written instructions given to the jury, were given by the court, on the court's own motion. That no oral instructions were given in the charge to the jury made previous to the retiring of the jury for deliberations. That defendant requested proposed Defendant's Instructions to Jury, numbering 1 to 14, inclusive, and also Additional Jury Instructions Requested by Defendant, numbering 15 to 21, inclusive, all of which proposed instructions were denied by the trial court. That the trial court after the jury retired, on the court's own motion, further instructed the jury orally. Defendant did not request any of the oral instructions that were given to the jury, his request for instructions being denied in its entirety, and defendant did except to, and still does except to the charge as given to the jury.

The foregoing Statement on Appeal was prepared within the time allowed by law, and it with the Reporter's Transcript, correctly sets forth all of the proceedings had in the trial of the above entitled action, and contains all of the evidence offered, heard, and received, and all of the instructions both written and oral that were given to the jury.

GROUNDS OF APPEAL.

I.

The Court erred in overruling the demurrer.

II.

The Court erred in denying the motion for a new trial

III.

The evidence is insufficient to support the verdicts and judgments of conviction.

IV.

The verdicts were and are contrary to law

V

The verdicts were and are contrary to the evidence.

VI

The Court erred in decisions of matters and questions of law arising during the course of the trial

VII.

The Court misdirected the jury in matters of law.

VIII.

The Court erred in refusing each and all of the instructions requested on behalf of the defendant.

IX.

The Court erred in overruling the objections of the defendant made at the time to the admission of testimony and evidence against the defendant, and to the admission of testimony taken and received at the trial.

X.

Said judgment of conviction deprived defendant of liberty and property without due process of law for the following reasons:

(a) The complaint does not charge a public offense.

(b) Defendant could lawfully perform each act charged in Counts I, II, and III, of the complaint, by virtue of his chiropractic license.

(c) The trial court deprived defendant of his right to trial by jury, wherein the trial court invaded the province of the jury to acquit, by, in effect, directing a verdict of guilt.

(d) Misconduct of the trial court in brow-beating the jury to convict.

XII.

The sentence passed is excessive, and constitutes cruel and unusual punishment.

XIII.

The court erred in considering matters in aggravation of the sentence in violation of Section 1204 P. C.

Dated: This 16th day of November, 1959.

BARBARA WARNER
BARBARA WARNER
Attorney for Defendant and Appellant

The foregoing statement on appeal was served, filed and prepared within the time allowed by law, and correctly sets forth all of the proceedings had during the trial of the cause, and in conjunction with the reporter's transcript contains all of the evidence offered and received in the trial of said cause, and is this 21st day of November, 1959, settled and allowed as correct.

PARKS STILLWELL
Judge

(Pages 235 and 236 of Certified Record)

In the Superior Court of the State of California in and for the County of Los Angeles, Appellate Department.

The People of the State of California, Plaintiff and Respondent, vs. Marvin Dayan aka Marvin Dayon, Defendant and Appellant. No. Cr. A 4270. Trial No. 98050.

CERTIFICATE OF PRESIDING JUDGE AS TO FINALITY OF JUDGMENT AND THAT CONSTITUTIONAL QUESTIONS WERE CONSIDERED.

I, FRANK G. SWAIN, Presiding Judge of the Appellate Department of the Superior Court, in and for the County of Los Angeles, California, hereby certify:

I.

That the above entitled court is the highest court in the State of California available to the defendant and appellant, Marvin Dayan, in his appeal from the judgment of conviction by the Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California, No. 98050, in which a decision could be had; that this Court did deny the appeal and affirmed the judgment and on March 16, 1960 entered an order denying a petition for rehearing and judgment became final on said date, leaving nothing to be done by the Court below but to execute the judgment already rendered, which disposes of all of the elements of the controversy.

II.

That in the above entitled cause the question of whether or not the arrest, conviction and detention of the defendant and appellant for an alleged violation of Section 2141 of the California Business and Professions Code

is repugnant to the provisions of the 14th. Amendment of the Constitution of the United States, Section 1 thereof, which provides as follows:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws," was considered and passed upon by this Court.

DATED: May 16, 1960.

ATTEST: May 16, 1960.

HAROLD J. OSTLY,
Clerk of said Court

By J. MacGregor
Deputy

FRANK G. SWAIN
Frank G. Swain
Presiding Judge

Instructions Given to Jury on Motion of Court Found in Certified Record at Page 27 to 35 Inclusive.

Ladies and gentlemen of the Jury, it becomes my duty as Judge to instruct you concerning the law applicable to this case, and it is your duty as Jurors to follow the law as I shall state it to you.

The function of the Jury is to try the issues of fact that are presented by the allegations in the Complaint filed in this Court and the defendant's plea of "Not Guilty."

This duty you should perform uninfluenced by pity for the defendant or by passion or prejudice against him. You must not suffer yourselves to be biased against the defendant because of the fact that he has been arrested for these alleged offenses or because a Complaint has been filed against him or because he has been brought before the Court to stand trial. None of these facts is evidence of his guilt, and you are not permitted to infer or to speculate from any or all of them that he is more likely to be guilty than innocent.

You are to be governed solely by the evidence introduced in this trial and the law as stated to you by me. The law forbids you to be governed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the People and the defendant have a right to demand, and they do demand and expect, that you will conscientiously and dispassionately consider and weigh the evidence and apply the law of the case, and that you will reach just verdicts regardless of what the consequences of such verdicts may be. Each verdict must express the individual opinion of each Juror.

The Jury is the sole and exclusive judge of the facts and of the weight of evidence, and you are to weigh the facts upon the testimony and other evidence produced or stipulated to here in court. If any facts have been stipulated to, such facts are to be deemed as conclusively proven. If any evidence has been admitted and afterward stricken out, you must disregard the matter so stricken out, entirely, and if either counsel has intimated by questions which the Court has not permitted to be answered, that certain things are, or are not, true, you must disregard such questions and refrain from any inference based upon them. If either counsel has made any statements in your presence concerning the facts in the case other than stipulations, you must be careful not to regard such statements as evidence, but to look entirely to the evidence as produced or stipulated to in ascertaining what the facts are. If either counsel has expressed an opinion as to the guilt or innocence of the defendant, such opinion is to be disregarded.

The jurors are the sole and exclusive judges of the effect and value of evidence addressed to them and of the credibility of the witnesses who have testified in the case. The character of the witnesses, as shown by the evidence, should be taken into consideration, for the purpose of determining their credibility and determining whether or not they have spoken the truth. The jury may scrutinize the manner of witnesses while on the stand and consider their relation to the case, if any, together with their degree of intelligence.

A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he or she testifies, his or her interest in the case, if any, or his or her bias or prejudice, if any, against

one or any of the parties, by the character of his or her testimony, or by contradictory evidence; and the Jurors are the exclusive judges of the credibility of each witness.

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal, but the effect of this presumption is only to place upon the State the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: It is not a mere possible doubt, because everything relating to human affairs, and depending upon moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all of the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty, of the truth of the charge.

The law does not require demonstration, or that degree of proof which, excluding all possibility of error, produces absolute certainty; for such degree of proof is rarely possible. Only that degree of proof is necessary which convinces the mind and directs and satisfies the conscience of those who are bound to act conscientiously upon it.

In a case charging offenses as here, it is the duty of the defendant to show what, if any license has been issued to him to practice any of the healing arts in this State. It is uncontradicted that the defendant is licensed as a Doctor of Chropractic and is unlicensed as a practitioner in any other of the healing arts.

You are instructed that it is unlawful under the Section here charged for a chiropractor to give a hypodermic

injection for the treatment of any ailment, disease or other physical condition. That it is further unlawful for him to sever or penetrate the tissues of human beings. Therefore, if you find beyond a reasonable doubt that the defendant did, on or about September 6th, 1958, give a hypodermic injection or injections to a human being or human beings, for the treatment of any ailment, disease or other physical condition, then you should find the defendant guilty as charged in Count I.

Also, if you find beyond a reasonable doubt, that the defendant did, on or about the 11th day of October, 1958, give a hypodermic injection or injections to a human being or human beings, for the treatment of any ailment, disease or other physical condition, then you should find the defendant guilty as charged in Count II.

Also if you find, beyond a reasonable doubt, that the defendant did, on or about October 29th, 1958, give a hypodermic injection or injections to a human being or human beings for the treatment of any ailment, disease of other physical condition, or if you find beyond a reasonable doubt that on or about October 29th, 1958, the defendant vaccinated a human being or human beings, then you should find the defendant guilty as charged in Count III.

Upon retiring to the jury room you will select one of your fellow jurors to act as foreman, who will preside over your deliberations and will sign the verdict to which you may agree. In order to return a verdict it is necessary that all the jurors agree to the decision. As soon as all of you have agreed upon verdicts, you shall have them signed by your foreman and then return with them to this room.

Instructions to Jury After Request for Clarification, Appearing on Pages 230 and 231 of the Certified Record.

Los Angeles, California, Monday, November 2, 1959; 12:02 P.M.

THE COURT: Mrs. Warner, the jurors have asked for some clarification. If you will be seated, we will get them out and see if we can help them in any respect.

(Whereupon at 12:03 P.M., on this date, the Jury returned to the courtroom.)

THE COURT: In the matter of the People against Marvin Dayan, I would address myself, if I may, to the Foreman of the Jury. I am advised, sir, that some clarification is requested or needed by the Jury in its deliberations. Is that correct?

FOREMAN OF THE JURY: On one part of the license.

THE COURT: What do you wish to know?

FOREMAN OF THE JURY: Do you want me to state it?

THE COURT: Whoever is the foreman I would like to have state what you need that you think will be helpful in your deliberations, sir.

FOREMAN OF THE JURY: If we can just read over the license itself.

THE COURT: Don't you have it? Do you want it?

FOREMAN OF THE JURY: May I see the license?

THE COURT: I don't know how much more specific the Court can be than the Court has been to you. It makes no difference what the license says. I have instructed you that if he gave injections or if he vaccinated a person he is guilty of this offense, even though he be a licensed chiropractor. Now, how much clearer one can

be on that than that I don't know. That is what I have told you. That is what the law is.

You are bound to follow it whether you like it or not or whether you like what the license says or not. It isn't your job to take the license and attempt to interpret what it means. You may see it, of course, if you want it. I don't see how it is going to help you any.

FOREMAN OF THE JURY: Actually the term on the license was "hygienic—"

THE COURT: I don't care what the license says or what the term "Hygienic," means. It should have no meaning to you in the deciding of this case. I have instructed you as succinctly and completely as I know how and as simply as I know how on what the law is, as I understand it, and as I have instructed you. A chiropractor may not give injections by hypodermic needle nor may he vaccinate persons. I have told you that if you find, beyond a reasonable doubt, either of those things, on the dates indicated, then you are to find him guilty.

How much more succinctly can I put it? I would think with that you should be able to arrive at a verdict. I will ask you to go back and deliberate or do whatever it is you have attempted to do.

APPENDIX E.

Text of Case of People v. Mansfield, CR A 1749, Superior Court of the State of California, Appellate Department.

In the Appellate Department of the Superior Court County of Los Angeles, State of California.

People of the State of California, Plaintiff and Appellant, vs. J. B. Mansfield, Defendant and Respondent.

MEMORANDUM OPINION.

Appeal by defendant from an order of dismissal made by the Justice's Court of San Gabriel Township, C. E. Christopher, Judge. Order reversed.

The statement on appeal and the complementary minutes of the trial court show that upon the filing of the amended complaint the defendant was arraigned and thereupon made the suggestion that the court, of its own motion, dismiss the action. So far as appears—and the minutes go into details—there was no plea entered, no waiver of a jury trial, no jury impanelled, and it affirmatively appears that the stipulation was "for the purpose of hearing the motion." We conclude that the trial of the case had not been entered upon; the defendant had not been put in jeopardy; and the people's appeal is authorized.

The fundamental error in the reasons given for the order of dismissal appears in the recital, in the order itself, "that the things charged as against this defendant are the things prohibited under the said Chiropractic Act, a penalty being provided therein for any violation thereof. . . ." Nowhere in the Chiropractic Act (Act 4811, Deering's Gen'l Laws 1937) is it declared to be unlawful to do any of the acts charged against the de-

fendant. One finds the commission of those acts declared to be a misdemeanor in section 2141 of the Business and Professions Code or nowhere.

The fault of the argument supporting the order lies in the interpretation placed upon section 7 of the Chiropractic Act, which, after stating that a license to practice chiropractic authorizes certain acts, continues: "but shall not authorize the practice of medicine, surgery, osteopathy, dentistry or optometry . . ." The language does not permit of the interpretation that its provisions make it unlawful for the holder of a chiropractor's license to practice optometry, for example. If sections 3000-3152 of the Business and Professions Code were repealed, so that generally there was no restriction on the practice of optometry, could it be seriously argued that section 7 of the Chiropractic Act made it a public offense for holders of chiropractic licenses to practice optometry? All that the concluding words of section 7 purport to do is make it clear that the authority of the license referred to in the section does not authorize the licentiate to engage in the named practices, which are prohibited by other statutes.

Section 1000 of the Business and Professions Code serves no function other than to "complete the record." It makes no attempt to enlarge the scope of the Chiropractic Act. If it were given the effect which is attempted to be accorded it, it would follow that one licensed to practice chiropractic would be governed only by the Chiropractic Act respecting the practice of dentistry and of veterinary medicine. Such an interpretation is obviously untenable.

The contention that chiropractors are denied the equal protection of the law, if the present complaint is held good, is in essence an attack upon the principle that an

exception need not be negatived in a complaint. But, as pointed out in People v. Fowler (1938) 32 Cal. App. (2) 737, 84 P. (2) 326, and again in People v. Tilkin (1939) 34 Cal. App. (2) 743, 90 P. (2) 148, 151, this principle is one of universal recognition; this court may not deny it. The only question open for consideration by us is whether or not the principle so thoroughly established was properly applied in People v. Fowler. Further consideration of this question has not caused us to change our opinion. We hold that the complaint before us states a public offense and that it was error to dismiss the complaint. The order of dismissal is reversed.

BISHOP
Judge

Dated December 13, 1940.

I concur in the foregoing opinion, but desire to add to it my conclusion that, aside from the effect of respondent's claim of discrimination upon the rule against negativing exceptions in a criminal pleading, that claim lacks substance. In effect, the discrimination to which he points is that, under the statute as construed by us, one holding a chiropractor's license may be charged with doing an act which is authorized by that license, without mentioning such license in the complaint, and thus compelled to make his defense by producing his license, whereas one holding a license under the medical practice act or the osteopathic act cannot be put in that predicament because of the necessity of negativing his possession of such license in the complaint. This claim assumes that an unfounded charge will be brought against a chiropractor, but not against holders of the other licenses mentioned. This is not the proper basis for considering the question of discrimination. We must assume the same situation in each case, that is, that an unfound-

ed charge is made. Thereupon in each case, regardless of the form of the complaint, the defendant will be put to the necessity of making his defense and presenting his license, for the allegations of want of licenses, being negative allegations of matters peculiarly within the knowledge of the defendant, need not be proved by the prosecution. People v. Mecklin (1934) 2 Cal. App. (2d) Supp. 751, 758, and cases there cited. The only real difference between the two cases, then, is that one making an unfounded charge against the holder of a medical or osteopathic license must swear to an untrue statement and thus possibly (but not necessarily) commit perjury, whereas an unfounded charge against a licensed chiropractor may be made without the maker so involving himself. A statute or discrimination which depends for its existence on the assumption that an unwarranted criminal charge will be made and prosecuted and operates only to facilitate convicting the citizens of against one class of persons as compared with others, seems to me too unsubstantial to support a holding that any defendant is deprived of the equal protection of the laws.

STEAD
Presiding Justice

I agree with my Associates generally in their conclusions excepting [illegible] that the complaint states a public offense. [illegible] I believe fails to state any public offense. I dissent from the order made.

The complaint charges that defendant [illegible] a system or mode of treating the sick or afflicted without having at the time of so doing a valid unrevoked certificate from the Board of Medical Examiners of the State of California [illegible] the Board of Osteopathic Examiners of the State of

California. There is nothing in the complaint to show that the defendant did any act which the holder of a valid, unrevoked certificate from the Board of Chiropractic Examiners could not lawfully do, nor is it alleged that he had no such certificate.

In order to ascertain the status of the law and that a criminal offense has been committed in "practicing a system or mode of treating the sick or afflicted", it is just as necessary to consider the Chiropractic Act as it is the Medical Practice or Osteopathic Acts. As it was essential in People v. Tilikin (1938) 34 Cal. App. (2d) 745 to consider the several sections of the City Picketing Ordinance in order to ascertain the status of the law and that an offense had been committed, so is it necessary here.

Consistency should not be regarded as merely a jewel for courts to admire but as a necessity of life for justice to preserve.

Since the complaint does not state a public offense the order should be affirmed.

SCHAUER
Judge.

The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office.

Dated: May 24, 1960

HAROLD J. OSTLY, COUNTY CLERK AND CLERK OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES.

By: H. B. CRAIG
Deputy